84-1132

NO.

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1984

EASTWAY WOMEN'S CLINIC, INC.,
Petitioner

V.

EASTWAY GENERAL HOSPITAL, LTD.,
Respondent

On Writ Of Certiorari
To The United States Supreme Court
From The Fifth Circuit Court Of Appeals

APPENDIX

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ATTORNEY FOR RESPONDENT

EASTWAY GENERAL HOSPITAL, LTD., d/b/a Eastway General Hospital, Plaintiff-Appellee,

v.

EASTWAY WOMEN'S CLINIC, INC., d/b/a Eastway Women's Clinic, Defendant-Appellant.

No. 83-2502.

Cite as 737 F.2d 503 (1984)

~~United~~ States Court of Appeals, Fifth Circuit.

July 30, 1984.

Otha T. Carpenter, Houston, Tex., T.E. Swate, Pasadena, Tex., Eric Carter, Houston, Tex., for defendant-appellant.

Fulbright & Jaworski, Larry C. Jones, Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before TIMBERS,* POLITZ and RANDALL, Circuit Judges.

POLITZ, Circuit Judge:

Eastway Women's Clinic, Inc., appeals the district court's imposition of sanctions under Fed.R.Civ.P. 37, including the striking of its

defenses, entry of adverse judgment on the merits, and the assessment of $1,000 in attorney's fees. Upon review of the record, we find the sanctions imposed, albeit severe, are justified by the conduct of defendant's representative, Tommy E. Swate, who is both a licensed physician and a practicing attorney, and by defendant's supervisory employee, Tehlma Babineaux. Finding the sanctions within the discretion accorded the district court, we affirm.

Eastway General Hospital, Ltd., a Texas limited partnership doing business as Eastway General Hospital, sued Eastway Women's Clinic, Inc., a Texas corporation, for service mark and trade name infringement and for unfair competition arising out of its operation of an abortion clinic adjacent to the Hospital. Pending hearing on the Hospital's request for a preliminary injunction, the Hospital made repeated unsuccessful efforts to effect meaningful discovery on the Clinic. Records were sought and depositions were scheduled.

The answer filed by the Clinic bore the attestation of Thelma Babineaux, identified therein as administrator of the Clinic. The Hospital noticed the oral deposition of Babineaux, requested production of documents, requested the designation of a representative under Fed.R.Civ.P. 30(b)(6), and noticed the taking of that representative's deposition. The production of records and the designation and deposition of the 30(b)(6) representative were scheduled for June 20, 1983. Babineaux's deposition was scheduled for June 23, 1983.

June 20 came and passed, and there was neither production of records nor designation of the 30(b)(6) representative. On June 23, 1983 Babineaux failed to appear for her deposition. The Hospital immediately moved to compel discovery and sought sanctions. A hearing was conducted on that date. At that hearing, attended by counsel for the Hospital and by Swate in the capacity as attorney of record for the Clinic, Swate made known that he would be the sole Rule 30(b)(6) designee of

the defendant corporation. Because of the resulting conflict, the court required that the Clinic obtain new counsel and ordered that discovery be completed by July 1, 1983.

The Clinic then retained its present counsel who promptly advised of his inability to meet the discovery schedule. Upon request of the Clinic's new counsel, the parties agreed to a modification of the ocurt's order of June 23, 1983. As modified, the order extended the disvocery date and: (1) set the deposition of Swate for July 7, 1983 at 1:30 p.m.; (2) set the deposition of Babineaux for July 8, 1983 at 10:00 a.m.; and (3) set the deposition of the Hospital's Rule 30 (b)(6) designee for July 13, 1983 at 1:30 p.m.

On July 7, 1983 Swate appeared for his deposition but did not produce the requested documents causing a premature adjournment of the deposition. On July 8, 1983 counsel were present at the appointed time to take the deposition of Babineaux. She did not appear. There was neither forewarning nor explanation

of her failure to appear. Later in the day the Hospital's counsel filed a second motion to compel discovery and for sanctions.

Counsel for the Clinic declined to appear in person at the conference but participated by telephone. After hearing the arguments of counsel, the district court ordered that: (1) Swate appear for a continuation of his deposition at the office of the Hospital's counsel at 9:00 a.m. on July 12, 1983; (2) that the documents and items requested be produced at that time and place; and (3) that Babineaux appear for deposition at the office of the Hospital's counsel at 1:00 p.m. on that date. The court specifically noted that if any part of this order was not followed it would entertain a motion for sanctions, including the striking of all defenses.

On July 12, 1983 counsel met at the appointed time and place. Swate did not appear. The records were not produced. After waiting a half hour or more, the Hospital's counsel provoked a third hearing to consider sanctions.

After reviewing the record and considering the arguments of counsel, including the explanation for Swate's failure to appear, because of Swate's "repeated failure to permit discovery and to obey this Court's orders to provide or permit discovery," the district court struck the Clinic's defenses, issued a permanent injunction in favor of the Hospital, and awarded the Hospital $1,000 for attorney's fees incurred in its unsuccessful discovery efforts.

Fed.R.Civ.P. 37 enumerates the sanctions available when a party unreasonably fails to comply with orders of the court. The pertinent sections prescribe:

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

* * * * * * * * *

(b) Failure to Comply with Order

* * * * * * * * *

(2) Sanctions by Court in which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testi-

fy on behalf of a party fails to obey an order to provide or permit discovery,... the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * * * * * * * *

(C) An order striking out pleadings or parts thereof ... or rendering a judgment by default against the disobedient party:

* * * * * * * * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the ocurt finds the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * * * * * * * *

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for inspection. If a party or an officer, director, or managing agent of

a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice ... the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[1] In reviewing the imposition of sanctions, the appellate court asks only: (1) was any relevant factual finding clearly erroneous, Fed.R.Civ.P. 52(a), and (2) did the district court abuse its discretion? See, e.g., S.E.C.

v. First Financial Group of Texas, Inc., 659 F.2d 660 (5th Cir.1981). There is no suggestion of an erroneous factual finding by the trial judge; we therefore need only determine whether there has been an abuse of discretion. [2] After reviewing the entire record, including the recordings of the chambers conference held on July 8, 1983 and July 12, 1983, we are convinced that the sanctions imposed were warranted. Swate's conduct was contumacious and unworthy of an attorney. Further, the actions of the representatives of the defendant Clinic were in bad faith and in callous disregard of the obligations of any party to litigation. The trial judges's response was within his broad range of discretion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIIVSION

EASTWAY GENERAL HOSPITAL, LTD. d/b/a Eastway General Hospital	)	
vs.	)	CIVIL ACTION NO. H-83-3200
EASTWAY WOMEN'S CLINIC, INC. d/b/a Eastway Women's Clinic	)	

ORDER

During a conference in chambers on July 8, 1983 concerning the failure of Ms. Babineaux to appear twice for the depositions and the failure of Dr. T.E. Swate to produce requested documents, the Court ordered that the Defendant produce Dr. T.E. Swate along with all the requested documents for a deposition on Tuesday, July 12, 1983 at 9:00 a.m.; that Ms. Babineaux appear on that same date at 1:00 p.m. and that failure to comply with the order would result in sanctions being issued, including the striking of the Defendant's defenses. Dr. T.E. Swate failed to appear for his deposition on July 12, 1983.

Accordingly, the Court ORDERS that the

Defendant's defenses are stricken and that the Defendant reimburse the Plaintiff $1,000.00 for reasonable attorney's fees incurred in attempting to secure Ms. Babineaux and Dr. Swate's depositions.

SIGNED and ENTERED this _____ day of July 1983.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EASTWAY GENERAL HOSPITAL, LTD. d/b/a Eastway General Hospital, Plaintiff	X	
VS.	X	CIVIL ACTION NO. H-83-3200
EASTWAY WOMEN'S CLINIC, INC. d/b/a Eastway Women's Clinic, Defendant	X	

FINAL JUDGMENT

Plaintiff's July 12, 1983, motion for sanctions having come on for hearing before the Court on said date, and Plaintiff having announced to the Court that it has waived its claim for damages subject to faithful compliance by Defendant with the terms of this Final Judgment, and the Court, having considered the record and the argument of counsel, finds as follows:

1. This Court has jurisdiction of this action and the parties hereto under 15 U.S.C.§ 1121 and 28 U.S.C.§1331(a), §1337, §1338(a), and §1338(b).

2. On June 9, 1983, Plaintiff properly filed and served on Defendant the following document production request and deposition notices: "Plaintiff's Notice of Deposition of Defendant and Request For Production of Documents"; and "Notice of Oral Deposition of Thelma Babineaux, Administrator of Eastway Women's Clinic." Defendant, however, failed to provide either irs Rule 30(b)(6) designee(s) Ms. Babineaux, or any of the requested documents on June 20 and 22, the dates specified in the above notices for the respective depositions and document production.

3. At a hearing of June 23, 1983, this Court considered "Plaintiff's Motion To Compel Discovery and For Sanctions Under Rule 37(d)." This hearing was attended by counsel for both parties and, after considering the argument of counsel, this Court ordered, inter alia, that all discovery in this matter be completed on or before July 1, 1983.

3. Subsequent and pursuant to the June 23 Order, Defendant retianed new counsel. In

an effort to accomodate the schedule of the newly retained counsel, counsel for the parties entered into an agreed modification of the June 23 Order. The agreed modification was signed and entered as an Order of this Court on July 6, 1983, entitled "Order Re Schedule of Depositions." Said Order reflected, inter alia, the agreement of Defendant's counsel for the taking of the Rule 30(b)(6) deposition of Defendant (pursuant to the June 9 notice) on July 7, 1983, and the deposition of Ms. Babineaux on July 8, 1983.

4. On July 7, 1983, the deposition of Dr. Tommy E. Swate, Defendant's sole Rule 30 (b)(6) designee, was commenced. Dr. Swate is also a licensed attorney, is admitted to practice before this Court, and was, in fact, Defendant's original counsel. Defendant failed to produce any of the requested documents. Plaintiff's counsel adjourned said deposition without completing it owing to its inability to complete the deposition effectively without the benefit of document production.

5. On July 8, 1983, counsel for both parties made appearances at the scheduled deposition of Ms. Babineaux. Without any explanation of forewarning, Ms. Babineaux failed to appeal for the deposition. After waiting thirty minutes after the scheduled commencement of the deposition, counsel for both parties made statements for the record ("Certificate of Non-Aopearance and Statement for the Record" of July 8, 1983, on file herein), and Plaintiff's counsel immediately moved this Court for sanctions and further discovery orders.

6. A second discovery hearing was held on July 8, 1983, at which hearing Plaintiff's counsel appeared in person and Defendant's counsel appeared via telephone (after rejecting Plaintiff's counsel's invitation to join in a personal appearnace before the Court). At that time, this Court entered its Order that: (1) Defendant produce Dr. Swate for the continuance of his deposition at the offices of Plaintiff's counsel at 9:00 a.m. on

July 12, 1983; (2) Defendant produce all requested documents and things at the offices of Plaintiff's counsel at 9:00 a.m. on July 12, 1983; (3) Defendant produce Ms. Babineaux for oral deposition at the offices of Plaintiff's counsel at 1:00 p.m. on July 12, 1983; (4) Failing any of the above, Defendant's defenses would be stricken. Further, Plaintiff's counsel was instructed to examine Ms. Babineaux with respect to any reasons for her July 8 failure to appear for her deposition, after which examination the Court would consider Plaintiff's request for monetary sanctions.

7. On July 12, counsel for both parties appeared at the place and time appointed for Dr. Swate's deposition. At that time, Plaintiff's counsel requested the production of documents, as also required under the July 8 Order. Defendant's counsel refused to produce any documents at that time. In addition, Dr. Swate failed to appear for the deposition. Statements were made on the record by counsel for both parties, and Plaintiff's counsel noti-

fied Defendant's counsel of its intent to immediately seek the sanctions of this Court.

8. Later in the morning of July 12, counsel for both parties appeared in chambers for a hearing on Plaintiff's oral motion for further sanctions. Upon reviewing the record and having heard the argument of counsel, this Court orally ordered, owing to Defendant's repeated failure to permit discovery and to obey this Court's orders to provide or permit discovery, that: (1) the Defendant's defenses be stricken; (2) a permanent injunction be issued against the Defendant; and (3) Plaintiff be awarded $1,000 representing attorney's fees incurred pursuing discovery and in presenting these discovery related matters to the Court.

9. Subsequent to said hearing and Order of July 12, Plaintiff's counsel has advised the Court that, contingent upon Defendant's faithful compliance with this Final Judgment, Plaintiff's claim for damages is being withdrawn so that a final judgment may be entered

in this action. Pursuant to Rules 37(b) and 37(d), Fed. R. Civ. P., it is hereby OREERED, ADJUDGED AND DECREED that:

(A) The history of discovery proceedings, as recited above and as reflected in the record, evidences the Defendant's willful disregard for this Court and its authority and has worked an undue hardship on Plaintiff's preparations for the requested hearing on its injunctive request and trial on the merits. Defendant's recurring failures and refusals to obey the orders of this Court and to comply with proper discovery requests and notices, particularly in view of the fact that Defendant's President, sole shareholder, and Rule 30(b)(6) designee is a licensed attorney, exhibit a flagrantly contumacious defiance and disrespect of the Court and the judicial process. Such actions and attitudes readily warrant the full breadth of sanctions permitted under the Federal Rules of Civil Procedure, and the Court explicitly finds that Defendant's failures and refusals justify such sanctions.

(B) Consequently, the defenses asserted by Defendant in the "Answer and Jury Demand of Eastway Women's Clinic Incprporated" are STRICKEN, and Defendant is not permitted to support those defenses or to oppose the claims set forth in Plaintiff's "Sworn Complaint", and the uncontested evidence in this case, including the Sworn Complaint of Plaintiff, shows, and the Court so finds, that:

(i) Plaintiff Eastway General Hospital, Ltd. is the owner of the trade names and service marks EASTWAY GENERAL HOSPITAL, EASTWAY GENERAL, EASTWAY HOSPITAL, and EASTWAY which it uses for medical services.

(ii) Secondary meaning has attached to Plaintiff's trade names and service marks EASTWAY GENERAL HOSPITAL, EASTWAY GENERAL, EASTWAY HOSPITAL, and EASTWAY for medical services.

(iii) Subsequent to, and with full knowledge of Plaintiff, Defendant has engaged in the provision of medical services under the trade name and service mark EASTWAY WOMEN's

CLINIC.

(iv) Defendant's usage of said trade name and service mark in connection with the sale, offering for sale, or advertising of medical services is likely to cause ocnfusion, and cause mistake, and to deceive the public.

(v) The acts of Defendant will cause immediate and irreparable injury, loss, or damage to Plaintiff.

(vi) The threatened injury to Plaintiff outweighs the possible damage to Defendant from the grant of either a preliminary or permanent injunction.

(vii) Both a preliminary and a permanent injunction in this case comport with the public interest, and should be entered.

10. IT IS FURTHER ORDERED, ADJUDGED and DECREED that Defendant, its agents, servants, employees and attorneys, and any other persons in active concert or participation with them, are permanently enjoined from:

(A) Using or employing, directly or indirectly, in any way or manner, the word EAST_

WAY as a part of the trade name or of a service mark for a medical care facility or the business thereof, or any colorable imitation or simulation of EASTWAY, in connection with Defendant's business activities, including, without limitation, the promotion, advertising or sale of medical services;

(B) Falsely representing or causing confusion in any manner such that the public would tend to falsely associate Defendant's business or medical services as affiliated with, or otherwise having any relationship with Plaintiff, its business or medical services;

(C) Unfairly competing with Plaintiff in the matters complained of, injuring Plaintiff's business reputation in any manner, and falsely describing, representing, or advertising the origin of Defendant's services, or otherwise engaging in deceptive trade practices; or

(D) Otherwise infringing or unfairly competing with Plaintiff.

11. IT IS FURTHER ORDERED that within twenty (20) days after the entry and service of this Final Judgment, Defendant cancel all advertisements and contracts therefor relating to the use of the word EASTWAY as a part of a trade name or as a service mark for medical services, and that Defendant deliver up for destruction all forms, displays, labels, signs, circulars, advertisements, advertising and promotional aids and other material in Defendant's possession or control relating to the use of the word EASTWAY as a part of a trade name or as a service mark for medical services, as well as all plates, molds, matrices, and things and other means of reproducing, counterfeiting, copying or otherwise imitating Plaintiff's service marks and trade names.

12. IT IS FURTHER ORDERED that within twenty (20) days after the entry and service of this Final Judgment, Defendant pay unto Plaintiff, through its counsel, the sum of One Thousand Dollars ($1,000), said sum representing reasonable attorney's fees necessarily in-

curred in bringing on the several motions for sanctions and other discovery related matters.

13. IT IS FURTHER ORDERED that Defendant file with this Court, and serve on Plaintiff within thirty (30) days after the entry and service of this Final Judgment, reports, in writing and under oath, setting forth the detail and from in which the Defendant has complied with this Final Judgment.

14. The Clerk will assess all costs incurred in this action against Defendant [the party incurring said cost].

SIGNED this _____ day of July, 1983.

_____
George E. Cire
United States District Judge

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to doso by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated

facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) Order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to

produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(d) Failure of Party to Attend Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or amnaging agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his depcsition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the re-

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quest, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).